

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Texas RSA 1 Limited Partnership dba XIT
Wireless

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File No. EB-09-SE-032
Acct. No. 201032100016
FRN No. 0001678614

ORDER

Adopted: April 9, 2010

Released: April 9, 2010

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau (“Bureau”) and Texas RSA 1 Limited Partnership dba XIT Wireless (“XIT”). The Consent Decree terminates an investigation by the Bureau against XIT for possible violation of section 1.1307(a)(4) of the Commission’s Rules (“Rules”)¹ regarding the construction of certain wireless communications facilities in Texas.

2. The Bureau and XIT have negotiated the terms of the Consent Decree that resolve this matter. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree which terminates the investigation.

4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether XIT possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, **IT IS ORDERED** that, pursuant to section 4(i) of the Communications Act of 1934, as amended,² and sections 0.111 and 0.311 of the Commission’s Rules,³ the Consent Decree attached to this Order **IS ADOPTED**.

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

¹ 47 C.F.R. § 1.1307(a)(4).

² 47 U.S.C. § 154(i).

³ 47 C.F.R. §§ 0.111, 0.311.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to Marjorie Spivak, Esq., counsel for Texas RSA 1 Limited Partnership dba XIT Wireless, Bennet & Bennet PLLC, 10 G Street, NE, Suite 710, Washington, DC 20002.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau

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Texas RSA 1 Limited Partnership dba XIT)	Acct. No. 201032100016
Wireless ("XIT"))	FRN No. 0001678614

CONSENT DECREE

The Enforcement Bureau ("Bureau") and Texas RSA 1 Limited Partnership dba XIT Wireless ("XIT"), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Bureau's investigation into whether XIT violated section 1.1307(a)(4) of the Commission's Rules ("Rules")¹ with respect to the construction of certain wireless communications facilities in Texas.

I. DEFINITIONS

1. For the purposes of this Consent Decree, the following definitions shall apply:
 - (a) "Act" means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
 - (b) "Adopting Order" means an Order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
 - (d) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.
 - (e) "Effective Date" means the date on which the Bureau releases the Adopting Order.
 - (f) "Investigation" means the investigation commenced by the Bureau upon receipt of a referral from the Wireless Telecommunications Bureau regarding XIT's possible violation of the Commission's environmental regulations set forth in section 1.1307(a)(4).
 - (g) "Parties" means XIT and the Bureau.
 - (h) "Rules" means the Commission's regulations found in Title 47 of the Code of Federal Regulations.
 - (i) "Texas RSA 1 Limited Partnership dba XIT Wireless" or "XIT" means Texas RSA 1 Limited Partnership dba XIT Wireless and its predecessors-in-interest and successors-in-interest.

¹ 47 C.F.R. § 1.1307(a)(4).

II. BACKGROUND

2. Section 1.1307(a)(4) of the Rules requires licensees to consider whether their proposed facilities would affect properties listed or eligible for listing (“historic properties”) in the National Register of Historic Places (“National Register”). In considering potential effects on historic properties, Section 1.1307(a)(4) requires licensees to follow the prescribed procedures established by the Programmatic Agreements for collocated antennas² and for historic preservation review.³ The Collocation and Nationwide Agreements⁴ are designed to tailor and streamline the review and consultation procedures required by the National Historic Preservation Act of 1966, as amended (“NHPA”),⁵ and the implementing regulations issued by the Advisory Council on Historic Preservation (“Advisory Council”).⁶

3. XIT is a provider of cellular service in the Texas 1 - Dallam Cellular Market Area. This market is extremely rural, consisting primarily of open ranchland in the panhandle of Texas. XIT conducted a full due diligence review of its tower sites and identified several towers constructed in late 2005 to the fall of 2006 for which XIT did not complete the historic review under Section 106 of the NHPA⁷ prior to construction. XIT has completed the NEPA⁸ review for effects, including historic preservation, and completed the tribal participation process. XIT’s completed environmental review, including the Section 106 review, concluded that no historic properties are identified in the Area of Potential Effects for direct effects and that there are no effects on historic properties identified in the Area

² See *Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with respect to Collocating Wireless Antennas on Existing Structures*, Public Notice, 16 FCC Rcd 5574 (WTB 2001), *recon. denied*, 20 FCC Rcd 4084 (WTB 2005) (“*Collocation Agreement*”).

³ See *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, WT Docket No. 03-128, 20 FCC Rcd 1073 (2004), *clarified*, 20 FCC Rcd 17995 (2005), *aff’d*, *CTIA-The Wireless Ass’n. v. FCC*, No. 05-1008 (D.C. Cir. September 26, 2006) (“*Nationwide Agreement*”).

⁴ Section 1.1307(a)(4) of the Rules incorporates by reference the Collocation Agreement and the Nationwide Agreement.

⁵ 16 U.S.C. § 470 *et seq.* The NHPA requires that a federal agency consider the effects of its federal undertakings, including actions that it authorizes or approves, on historic properties prior to issuing federal licenses, permits or approvals. See 16 U.S.C. §§ 470f, 470w(7). In considering such effects, the NHPA further requires the federal agency to consider the views of expert agencies. Specifically, the NHPA requires the federal agency to consider the views of the Advisory Council on Historic Preservation, the agency tasked with the responsibility for implementing the NHPA, the appropriate State Historic Preservation Officer, and, if affected historic properties are of religious or cultural significance to Indian tribes or Native Hawaiian organizations, their representatives. See 16 U.S.C. §§ 470a(a)(3), (d)(6)(B), 470f, 470i. Consistent with the Advisory Council’s regulations, the Commission’s environmental rules delegate the task of identification and initial consideration of the effects that proposed facilities may have on historic properties, including identifying and ensuring contact is made with potentially affected Indian tribes, to its licensees, permittees and applicants, but the Commission remains ultimately responsible for enforcement of the environmental rules. See 47 C.F.R. § 1.1307(a)(4); *see also* 36 C.F.R. § 800.2(a)(3); *Nationwide Agreement*, 20 FCC Rcd at 1076-77 ¶ 5.

⁶ See 36 C.F.R. § 800.1 *et seq.* Under the NHPA and the Advisory Council’s implementing regulations, a federal agency may, with the agreement of the Advisory Council and the relevant State Historic Preservation Officer or the National Conference of State Historic Preservation Officers, adopt Programmatic Agreements to tailor the historic preservation review and consultation procedures, as well as exempt actions that are unlikely to affect historic properties. See 16 U.S.C. § 470v; 36 C.F.R. § 800.14(b),(c).

⁷ 16 U.S.C. § 470f.

⁸ National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4321-4335.

of Potential Effects for visual effects. The Commission's Wireless Telecommunications Bureau ("WTB") reviewed XIT's Form 620's and supporting documentation, and concurred that the towers do not have an effect on historic properties. The WTB referred the matter to the Enforcement Bureau for investigation.

III. TERMS OF AGREEMENT

4. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.

5. **Jurisdiction.** XIT agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

6. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the date on which the Bureau releases the Adopting Order. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Bureau. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Bureau Order, entitling the Bureau to exercise any rights and remedies attendant to the enforcement of a Commission Order.

7. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its investigation. In consideration for the termination of said investigation, XIT agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in this investigation through the Effective Date of the Consent Decree, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against XIT concerning the matters that were the subject of the investigation. The Bureau also agrees that it will not use the facts developed in this investigation through the Effective Date of this Consent Decree, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against XIT with respect to XIT's basic qualifications, including its character qualifications, to be a Commission licensee or authorized common carrier.

8. **Compliance Plan.** For purposes of settling the matters set forth herein, XIT agrees to maintain a Compliance Plan related to future compliance with the Act, the Commission's Rules, and the Commission's Orders. The Plan will include, at a minimum, the following components:

- (a) XIT will implement on a company-wide basis detailed procedures to ensure environmental compliance. These procedures may be altered from time to time if XIT determines that other procedures may better enable it to comply with the FCC's environmental requirements. XIT shall notify the Bureau and the Wireless Telecommunications Bureau in writing regarding any such modifications at least 25 calendar days before they take effect and either the Bureau or the Wireless Telecommunications Bureau may disapprove such modification within 25 calendar days of their receipt of XIT's notification.
- (b) XIT has recently commissioned and made part of its internal procedures "A Scope of Work for Compliance with the FCC's Environmental Rules" manual. The "Scope of Work" manual describes the FCC's environmental requirements and the federal laws and policies that are cited in or related to the FCC's environmental rules. It also spells out in detail the responsibilities for environmental compliance of XIT's outside consultants

dealing with tower construction and those employees within XIT who supervise the consultants and the methods by which environmental compliance will be assured at each stage of the tower construction process. Attached to the “Scope of Work” manual are “checklists” by which responsible XIT employees may track environmental compliance for each new and collocated tower.

- (c) XIT will provide annual training to its employees responsible for environmental compliance to ensure that they are aware of their responsibilities to ensure compliance with environmental requirements by XIT. XIT will oversee any consultant it may employ to ensure compliance with the environmental requirements.
- (d) XIT has recently appointed an experienced Regulatory Compliance Manager, who is thoroughly familiar with the FCC’s environmental requirements. He will monitor and supervise XIT’s regulatory compliance efforts.
- (e) **Compliance Reports.** XIT will file compliance reports with the Commission ninety (90) days after the Effective Date, twelve (12) months after the Effective Date, and twenty-four (24) months after the Effective Date. Each report will identify all of XIT’s Section 106 reviews that were active during the reporting period. For each such Section 106 review, XIT will specify the dates of any FCC Form 620 submission to the State Historic Preservation Officer and notification to tribes, local governments and the public, as well as the resolution or current status of the review. Each report shall also include a compliance certificate from an officer, as an agent of XIT, stating that the officer has personal knowledge that XIT has established operating procedures intended to ensure compliance with this Consent Decree, together with an accompanying statement explaining the basis for the officer’s compliance certification. All reports shall be submitted to Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Rm. 3C366, Washington, D.C. 20554. All reports shall also be submitted electronically to Jackie Ellington at Jackie.Ellington@fcc.gov and to JoAnn Lucanik at JoAnn.Lucanik@fcc.gov.
- (f) **Termination.** Unless stated otherwise, the requirements of this Consent Decree will expire twenty-four (24) months from the Effective Date.

9. **Section 208 Complaints; Subsequent Investigations.** Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints filed pursuant to section 208 of the Act against XIT or its affiliates for alleged violations of the Act, or for any other type of alleged misconduct, regardless of when such misconduct took place. The Commission’s adjudication of any such complaint will be based solely on the record developed in that proceeding. Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the Commission from investigating new evidence of noncompliance by XIT of the Act, the rules, or the Order.

10. **Voluntary Contribution.** XIT agrees that it will make a voluntary contribution to the United States Treasury in the amount of twenty five thousand dollars (\$25,000.00). The payment will be made within thirty (30) days after the Effective Date of the Adopting Order. The payment must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN Number referenced in the caption to the Adopting Order. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account

number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). XIT shall also send electronic notification on the date said payment is made to Jackie Ellington at Jackie.Ellington@fcc.gov and to JoAnn Lucanik at JoAnn.Lucanik@fcc.gov.

11. **Waivers.** XIT waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order adopting the Consent Decree without change, addition, modification, or deletion. XIT shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither XIT nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and XIT shall waive any statutory right to a trial *de novo*. XIT hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

12. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

13. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which XIT does not expressly consent) that provision will be superseded by such Commission rule or Order.

14. **Successors and Assigns.** XIT agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

15. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Orders.

16. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

17. **Paragraph Headings.** The headings of the Paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

18. **Authorized Representative.** Each party represents and warrants to the other that it has full power and authority to enter into this Consent Decree.

19. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau

Date

Texas RSA 1 Limited Partnership dba XIT
Wireless

By: _____
Darrell F. Dennis
General Manager

Date